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IN THE

Supreme Court of the United States

October Term, 1968

No. 252

STUYVESANT INSURANCE COMPANY,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1967

No.

UNITED STATES OF AMERICA,

Appellee,

—against—

JOHN WESLEY EGAN and BRYAN JOHN HILL,

Defendants,

On intervention of

STUYVESANT INSURANCE COMPANY,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

The petitioner, Stuyvesant Insurance Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered against it in the above entitled case on May 29, 1968.

A. The Opinion Below

The opinion of the Court of Appeals in this case has not yet been officially reported. The opinion of Honorable Irving Ben Cooper, United States District Court Judge, is

attached to the appendix of the original brief filed by the defendants-appellants and in appendix A annexed to the petition of Stuyvesant Insurance Company, filed herewith.

B. Jurisdiction

The judgment of the Court of Appeals was entered on April 24, 1968, and the application for rehearing en banc was denied on May 29, 1968. The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28, United States Code, Section 1254(1) on the ground that review by the Supreme Court by writ of certiorari is sought of a judgment of affirmance on appeal by the United States Court of Appeals for the Second Circuit.

C. Questions Presented

1. Can the Government rightfully deprive petitioner of its property without due process of law?

2. Can the Government unilaterally state that they do not intend to prosecute a particular indictment and then argue in the alternative that they can still collect the forfeited bond under that indictment?

3. Can the Government enlarge the terms of the surety's undertaking without the surety's written consent?

4. Is an arrest by one government agency a harassment and confinement which would automatically exonerate the bond if the defendant is in custody at the time a bond should have been re-written?

5. Can the Court rightfully impose a burden upon defense counsel to inform the surety company of the change

in conditions when defense counsel is not privy to the contract written between the Government and insurance company?

D. United States Constitution and the Statutes

United States Constitution, Fourteenth Amendment.

United States Constitution, Sixth Amendment.

The statutes involved are: Federal Rules of Criminal Procedure, Rule 46.

E. Summary Statement of Matters Involved

On or about January 13, 1967, defendants John Wesley Egan and Bryan John Hill were arrested in Miami, Florida, and arraigned before the Court pursuant to a complaint filed in the Southern District of New York, charging each of them with allegedly conspiring to violate the Federal Narcotic Laws (21 U.S.C. 174). The defendants contested the complaint and demanded a removal hearing in Florida. The complaint naming these defendants also named several other defendants, many who were arrested in New York. The defendants were never afforded a removal hearing in Florida as the Government elected to file indictment number 67 Cr. 72 in the Southern District of New York on January 25, 1967, naming only Egan and Hill. It can be interpreted that this indictment was obtained solely for the purpose of preventing the defendants from getting a removal hearing. Bail was originally set in the sum of $100,000.00 and reduced to $25,000.00 by Judge Choate in Florida prior to the defendants being removed to the Southern Dis-

trict of New York. On February 6, 1967, a motion was made on behalf of the defendant Egan and later adopted by the defendant Hill for an immediate and speedy trial on indictment 67 Cr. 72. An additional application was made jointly on behalf of both defendants for a reduction of bail. The issue of a speedy trial* on this indictment was postponed many times over objection during the February Term, upon representation of the Assistant United States Attorneys William Tendy and Paul Rooney that they would attempt to obtain a superseding indictment (minutes of Feb. 20, 1967, pages 18-19). Bail was subsequently reduced by the Court on February 20, 1967, to $15,000.00 as to each defendant (minutes of March 3, 1967, pages 37, 42). On February 21, 1967, the defendant Hill was released on bond in this sum after specific conditions were imposed prior to the writing and acceptance of this bond. These conditions were made a part of the bond as a rider attached thereto and were signed by the defendant Hill and the surety company. Included in these conditions were the fact that Hill was compelled to report to the office of the United States Marshal every day including Sundays and holidays. On March 7, 1967, the Stuyvesant Insurance Company issued a bond for John Wesley Egan in the sum of $12,500.00 where the same conditions were imposed and accepted.

The conditions imposed under indictment 67 Cr. 72 were never altered while that indictment remained in full force and effect. On March 17, 1967, indictment 67 Cr. 196 was filed, naming Hill, Egan and several others as defendants. Bench warrants were issued but were never executed on Hill

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* The defendants' motion for a speedy trial was paradoxically denied by Judge Cannella after they had absconded.

and Egan and on March 20, 1967, the bench warrants were ordered vacated.[1] On March 21, 1967, Egan and Hill were taken into custody and placed in the Federal House of Detention by agents of the Immigration and Naturalization Service. The arrest occurred in the Office of the United States Marshal where they reported pursuant to the conditions imposed under 67 Cr. 72.[2] On March 23, 1967, Egan and Hill appeared in the United States District Court, Southern District of New York, before Judge Dudley B. Bonsal. Indictment number 67 Cr. 72 was marked off the calendar and superseded[3] by indictment 67 Cr. 196. The defendants were arraigned. A review of the Court docket sheets will indicate that Hill and Egan were not brought over from Immigration by any writ of habeas corpus ad prosecutem. It is also conceded that Egan was requested to appear again on March 24, 1967, so that the dispute concerning his representation by counsel could be ascertained. It should be conceded that on March 24, 1967, Egan did appear and that he was actually in custody on both March 23rd and March 24th, 1967. The docket sheets on indictment 67 Cr. 196 will also show that the bond should have been rewritten and there is no dispute that the bond was not rewritten under 67 Cr. 196. On May 22, 1967, an oral application was made to the Court on behalf of the defend-

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[1] Taken from docket entries in Clerk's office.

[2] Detention statements are annexed to the appendix as exhibits . . . and . . .

[3] The American College Dictionary defines "supersede" as follows: 1) To replace in power, authority, effectiveness, acceptance, use, etc., as by another person or thing. 2) To set aside, as void, useless or obsolete, now usually in favor of something mentioned. 3) To displace in office or promotion by another. 4) To succeed to the position, function, office, etc., of; supplant.

ants Hill and Egan for a relaxation of their bail limits.* This application was made when the case was called on indictment 67 Cr. 196 and was granted by Judge Cannella. The docket sheets reflect that he allowed them to report to the United States Marshal every ten days rather than once a day. There are no entries on the docket sheets for 67 Cr. 72 which show any alteration of the original bail conditions. There should also not be any dispute that after May 22, 1967, and after the defendants reported to the Marshal every ten days, instead of every day. There is also no dispute that there was no Court order signed, entered or docketed which was consented to by the surety company for any extension of these bail limits. On July 14, 1967, the United States Attorney notified the attorneys for the defendants and the surety that he suspected Egan and Hill had absconded and the case was placed on the calendar under indictment 67 Cr. 196 for July 17, 1967. The bond under 67 Cr. 196 was then ordered forfeited on July 20, 1967. Counsel for the defendant Hill immediately informed the Court of the surety's position on the bonds. Judge Bonsal only ordered the forfeiture of 67 Cr. 196, if this bond were in effect. When the United States Attorney realized that there was no bond, he recalled 67 Cr. 72 to the calendar.

F. Reasons for Granting Writ

POINT I

The United States Circuit Court for the Second Circuit, by denying relief to petitioner in the case at bar, effectively

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* Hill was represented by Joseph I. Stone Esq. Egan was represented by Gilbert S. Rosenthal Esq.

violates this Court's decision in *Stack* v. *Boyle*, 342 U.S. 1, and deprives petitioner of its property ($27,500.00) by not affording it an evidentiary hearing and accepting certain assumptions which were factually incorrect in arriving at a legal decision. The assumptions which were accepted by the trial court and the Circuit Court of Appeals which were incorrect and which the Circuit Court did not attempt to correct were as follows:

(a) The trial court felt that the defendants absconded on or about June 19, 1967. This was incorrect and was never corrected in either court's decision.

(b) The trial court assumed that because the same attorney appeared for the insurance company on petition and appeal that this attorney *absolutely* made the petitioner aware of all the defendants' movements or changes in bond conditions when at the time of the change in the bond conditions, this attorney did not represent the petitioner insurance company.

(c) Both courts assumed that the surety "however, apparently knew of and acquiesced in the change of the interval for reporting, and although more than a month and a half elapsed during which Stuyvesant could have required the defendants to report daily to itself as surety, it did not do so."

(d) The Circuit Court of Appeals stated that "Attorney Stone spoke in Court on behalf of Stuyvesant on March 3, 1967, at a hearing before Judge Weinfeld." The Circuit Court refused to grant a re-hearing to correct this erroneous interpretation.

The only way petitioner could have safeguarded his property was to obtain the requested evidentiary hearing. Both

courts could then have relied on sworn testimony, rather than "assumptions." Failure to afford petitioner an evidentiary hearing was in violation of the due process clause of the Fourteenth Amendment of the United States Constitution.

POINT II

On March 23, 1967, the bailbonds under 67 Cr. 72 should have been declared exonerated. The government asked that this indictment be "marked off the calendar." The government stated: "This indictment will not be tried." The Government and defendants then appeared to answer the superceding indictment, 67 Cr. 196.

The government, *not* the surety caused the defendants to be placed on liberty after March 23, 1967.

The government should not be permitted to take petitioner's property if the government is wholly or partially responsible for allowing Egan and Hill to have been released on an unwritten and void bond.

POINT III

"Bailbonds in criminal cases are contracts which are strictly construed in accordance with their terms and ordinarily all substantial procedural requirements must be complied with before the Court can duly render them forfeited and enter judgment", *Dudley* v. *U.S.*, 242 F. 2d 656; *U.S.* v. *Foster*, 278 F. 2d 567. If the Court enlarges the bail, the surety must be privy to the Court's ruling and bailbonds are strictly construed in favor of the surety, *Swanson* v.

U.S., 224 F. 2d 795. An invalid bond is not binding on either the principal nor the surety, *U.S.* v. *Hudson*, 65 F. 168.

The surety on a bailbond can be held liable only within the absolute terms of its undertakings which cannot be enlarged, *Ewing* v. *U.S.*, 240 F. 241. Judge Cannella's enlargement of the bail conditions, which were acted upon by the Government and the defendants, was not known to the surety company and not reflected in any way as applying to 67 Cr. 72.[5] Because of these enlarged conditions, the defendants had a better chance of absconding, in fact did abscond, and now the Government wants the surety to be equally as liable as if the surety consented to the enlarged conditions or was willing to write a bond in the absence of these conditions. "Consent of surety needed for change in travel restrictions", *U.S.* v. *Foster*, 79 F. Supp. 422. The affidavit of Raymond Robin, attorney in fact for the Stuyvesant Insurance Company, clearly indicated that he was aware of the conditions when he originally wrote the bond for Hill and also states that he would not have written the bond for Egan had not these conditions been prevalent. The Government cannot say at this stage of the proceedings that the surety company wrote the bonds and was aware of the enlarged conditions. No recovery should be had upon such a bond except upon a clear showing of liability under its express conditions, *U.S.* v. *Eisner*, 323 F. 2d 38.

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[5] Docket entries, Exhibits A and A[1].

POINT IV

The Supreme Court of the United States in *Stack* v. *Boyle, supra,* stated:

> "The purpose of a bailbond is, of course, to secure the presence of a defendant to answer the charge or charges against him and to respond to the judgment of the Court and at the same time afford freedom from harassment and confinement before proven guilty of the charge."

A certain amount of harassment is presumed from the undisputed record. However, the petitioners were prevented from showing to what degree this harassment occurred.

In *Romero* v. *United States,* 374 F. 2d 620, the Court refused to remit a portion of the forfeited bond. However, they noted that the defendant's absence was not because of an act for which the United States Government was responsible.

POINT V

A defense attorney is not a surety for the defendant he represents. A bailbond is a contract between the government, the surety and the defendant. The defense attorney is neither an agent of the surety, even if he recommends the defendant to the surety, nor is he always the defendant's agent. For the Court to increase an attorney's obligation to a third party would be contrary to the attorney-client relationship. It would also compel the third party to be liable for an attorney's acts when he didn't choose the attorney, therefore depriving him (in this case, the surety) of his Sixth Amendment rights.

CONCLUSION

The petition for certiorari should be granted and this court in the exercise of its power should order the judgment reversed.

Respectfully submitted,

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